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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the matter of:)	
)	
PETITION TO AMEND)	Supreme Court No. R-14-
RULE 36)	
Rules of the Supreme Court)	
_____)	

Pursuant to Rule 28, Rules of the Supreme Court, [Petitioner] of the Attorney Regulation Advisory Committee, respectfully petitions this Court to adopt amendments to Rule 36, Rules of the Supreme Court, governing the character and fitness assessment of the attorney admission process as proposed in the attached Appendix A, showing changes in legislative format.

I. Background and Purpose of Proposed Amendments

On May 4, 2011, the Court established the Attorney Regulation Advisory Committee (ARC) to assist the Court in the attorney admissions and discipline system.¹ During 2012, the Admissions Subcommittee of ARC began a review of the attorney admissions process which

¹ The members of the ARC are: Judge William J. O’Neil, Chair; Judge Lawrence Winthrop, Vice Chair; Attorney members: Alan Bayham; James Drake; George Riemer; J. Scott Rhodes; Patricia Sallen; Pamela Treadwell-Rubin; John Tuchi; and Maret Vessella; and Public members: Benny Click; Ronald Ross Watson; and Emily Johnston.

included monthly forums of information-sharing and public comment. The purpose of ARC's review was to evaluate the character and fitness process's actual fairness, its perceived fairness, and its effectiveness in meeting the goals of this Court—protecting the public, clients and the bar from persons who lack the character, fitness and/or competence to practice law in this jurisdiction. The ARC Admissions Subcommittee made recommendations to the full ARC in the Draft Memorandum, attached as Appendix B. The ARC accepted the subcommittee's proposals; the proposed amendments are summarized below.

II. Contents of the Proposed Rule Amendments

The proposed amendments modify the proceedings before the Character and Fitness Committee by changing informal hearings to conversational inquiries, modifying panel make-up, empowering the Presiding Disciplinary Judge to preside at formal hearings, and modifying conditional admission to temporary admission, with the burden of proof remaining with the applicant until regular admission is granted. The amendments include the following:

Rule 36. Procedure Before the Committee on Character and Fitness

Rule 36(a) (1) General Provisions

The proposal removes all reference to “informal” or “formal” hearings and inserts “proceeding” instead.

Rule 36(a)(2)(A) and (B) Representation of Counsel; Duties of Bar Counsel

Committee panels are empowered to act on behalf of the Committee, and the Presiding Disciplinary Judge (PDJ) may preside at formal hearings. The PDJ may now deem matters “complex” and assign special investigators.

Rule 36(a)(2)(C)(ii) Temporary Admission

The proposal changes “conditional” admission to “temporary” admission and sets out reporting obligation of bar counsel in monitoring temporary admittees.

Rule 36(a)(3) Depositions and Subpoenas.

The investigating member may act on behalf of the Committee in investigating, and the Committee Chair may issue subpoenas or request depositions in gathering evidence. The PDJ may subpoena witnesses for formal hearings.

Rule 36(a)(4) Dispositional Alternatives.

The ARC recommends transforming “conditional” admission into “temporary admission” for a finite term during which bar counsel monitors and reports on specific issues, and temporary admittees retain the burden of proof regarding continuing fitness to practice in order to convert to regular admission.

Rule 36(b) Determination of Character and Fitness; Burden of Proof; Relevant Factors and Evaluation.

The ARC discussed whether listed factors are the best reflection of skills, traits and abilities required to practice law ethically, but did not reach conclusion and will not recommend amendments during this cycle. These factors shall be reviewed at a later time.

Rule 36(c) Recommendation for Admission Based on Preliminary Review.

The ARC recommends that the Manager of Attorney Admission or that person’s designee shall conduct a preliminary investigation and may approve files which, without additional investigation, appear to be qualified for admission. All other applicants shall be referred to the Committee for further investigation and action.

Rule 36(d) Further Investigation.

The Committee may act through the “investigating member,” who conducts further investigation or inquiry.

Rule 36(e) Informal Inquiries.

ARC has determined that the Committee would benefit from less rigid informal proceedings for the first inquiry, to be held before a panel of exactly three Committee members who must attend in person. Informal hearings will be more conversational and instructive, and will be handled by the investigating member before three other members of the Committee, to be assigned on a rotating basis by staff. The three panel members will deliberate after the inquiry and reach a decision; the investigating member will not participate in deliberations or decision. ARC intends this change to eliminate any appearance that a Committee member is acting as both advocate and judge. To ensure a diverse composition of the panel, the proposal recommends that the panel include both a lawyer and a non-lawyer member. At least two members must agree to reach a decision. There are no discovery obligations and subpoenas may not be issued; a record may be made but is not required.

Rule 36(e)(6)(A) Recommendation to admit.

The words “...by the Committee...” are inserted to clarify current language, indicating that the Committee does not take final action on any applicant but instead makes a recommendation.

Rule 36(e)(6)(B) Recommendation not to admit.

If the informal inquiry panel cannot reach a decision, a formal hearing must be held.

Rule 36(e)(6)(C) Recommendation for temporary admission.

The current rule permits the Committee to grant conditional admission, for which applicants are monitored, and violations are addressed in the member disciplinary context. The existence of conditional admission is not public, and converts automatically with no additional burden on the applicant and no additional scrutiny by the Committee. ARC recommends that conditional admission become “temporary” admission, for a finite term during which bar counsel monitors and reports to the Committee and staff regarding specific issues, and the Committee

refers violations it deems material to the PDJ for a revocation hearing rather than an attorney disciplinary proceeding. Upon bar counsel demonstrating by a preponderance of evidence at such hearing that the temporary admittee has materially violated the terms of their temporary admission, the PDJ may revoke the temporary admission, extend the length of its terms, or modify them.

Rule 36(f) Formal Hearings.

The proposal modifies the formal hearing panel to include four Committee members and the PDJ or his designate, who would preside. The investigating member shall present the file but shall not deliberate or vote, and no members of an underlying inquiry panel may participate in the formal hearing, if inquiry was held. ARC intends these changes in the makeup of a formal hearing panel to again enhance the appearance of fairness and to improve efficiency in scheduling and conducting formal hearings.

III. Conclusion

The proposed amendments to the character and fitness process will clarify certain procedures and improve the process for all involved. The ARC requests that the Court adopt the rule amendments as set forth in Appendix A.

RESPECTFULLY SUBMITTED this 10th day of January, 2014.

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Appendix A

➡Rule 36. Procedure Before the Committee on Character and Fitness

(a) General Provisions

1. *Nature of Proceedings.* ~~Informal or formal~~ Proceedings before the Committee on Character and Fitness are neither civil nor criminal, but are sui generis. Proceedings shall be styled as follows:

BEFORE THE COMMITTEE ON CHARACTER AND FITNESS
OF THE SUPREME COURT OF ARIZONA

In the Matter of the Application of _____)
To be Admitted to the Practice of Law)

2. *Representation by Counsel; Duties of Bar Counsel.*

A. *Representation of the Applicant.* The applicant may be represented by counsel of the applicant's choosing in any proceedings before the Committee or panels acting on its behalf.

B. *Representation of the Committee* ~~at Formal Hearing~~. In the event the Committee, by vote of a majority of its members, finds that a proposed formal hearing proceeding will be complex, or for other reasons deemed sufficient, the Committee may request that the Presiding Disciplinary Judge certify to this Court that in its opinion a special investigator should be appointed from an active member of the State Bar of Arizona to further investigate and present the evidence bearing upon the issue of the applicant's qualifications to be admitted to the practice of law in Arizona. The ~~chief justice of this Court~~ Presiding Disciplinary Judge may appoint such a special investigator to further investigate said matter and to present all available evidence at ~~the formal hearing~~ any proceeding.

C. *Duties of Bar Counsel.*

i. *Court review.* Upon the Committee Chair's request, bar counsel shall represent the Committee before the Court in any matter in which the applicant has petitioned for review of the Committee's decision after a hearing, ~~either formal or informal~~. In such cases, the Committee shall be deemed bar counsel's client.

ii. ~~Conditional Temporary admissions~~. Bar counsel shall monitor and supervise attorneys who have been granted temporary admission ~~admitted with conditions~~ pursuant to paragraph (a)(4)(D) of this rule. ~~At the end of the conditional period, Quarterly,~~ bar counsel shall forward a report to the Committee and staff regarding ~~the attorney's~~ compliance or non-compliance of all temporary admittees with the imposed ~~terms~~ conditions. Reports shall be submitted by the 5th day of the month each quarter.

3. *Depositions and Subpoenas*. All of the rules of civil procedure authorizing, relating to and governing depositions in civil proceedings within and outside the state are applicable to depositions desired either by the applicant or by the investigating member of the Committee in connection with investigations and hearings. Either the Committee's representative or the applicant shall be entitled to have subpoenas (including duces tecum) issued by the Chair of the Committee for discovery purposes, or issued by the Presiding Disciplinary Judge to require the attendance of witnesses at a deposition, hearing, and any continuance thereof. Subpoenas shall not be issued for informal inquiries. The party desiring issuance of such subpoena shall file the application therefor with the Chair of the Committee with a brief statement of the reasons for requiring such subpoena.

4. *Dispositional Alternatives*. The Committee's investigation, informal inquiry, or ~~the informal or formal~~ hearings may result in the following range of dispositional alternatives:

A. recommendation for admission;

B. denial of admission;

C. denial of admission, accompanied by a suggestion of re-application in the future upon the occurrence of specified circumstances, which circumstances may include the requirement the applicant obtain assistance or treatment for a specified period in the case of current substance abuse or mental or emotional instability and provide appropriate evidence of the applicant's ability to engage in the practice of law;

D. recommendation for temporary admission conditioned on compliance by the applicant with specified behavior for a specified period pursuant to paragraphs (e)(6)(C) or (f)(~~45~~) of this rule; ~~provided however that applicants for admission on motion shall not be recommended for conditional admission.~~

- i. Temporary admission is appropriate as a possible disposition only where the issues of concern to be monitored are of a type which is susceptible to objective verification of compliance with the terms imposed, which would include by way of example alcohol or substance abuse, financial irresponsibility, and mental health issues. Applicants for admission on motion are ineligible for temporary admission.
- ii. A decision recommending temporary admission shall include the duration and terms of the temporary admission, which terms shall always include prohibitions against violation of criminal laws and the Arizona Rules of Professional Responsibility. The decision shall reflect that bar counsel shall monitor and supervise the temporary admittee and that if the admittee is found by the Committee or bar counsel to have materially violated a term or terms of the

- admission, bar counsel shall commence a proceeding pursuant to subparagraph (iii) below.
- iii. Bar counsel shall report all violations of the terms of temporary admission, and other violations which may cause harm to the public or the profession, to the Committee and staff. The Committee Chair or bar counsel may refer suspected material violations to the presiding disciplinary judge. The presiding disciplinary judge shall hold a hearing as soon as practicable to determine if the terms have been violated, or if the public or profession may suffer harm. In a proceeding to determine if terms of temporary admission have been violated, a violation must be proven by a preponderance of the evidence. If the presiding disciplinary judge determines terms have been violated, he or she may (1) impose new, lengthened or modified terms or (2) terminate the temporary admission for failure to satisfy its terms. The presiding disciplinary judge's decision is final, absent the filing of a petition for review by the applicant pursuant to paragraph (g)(1) of this rule.
 - iv. At least thirty (30) days prior to the expiration of the temporary admission, bar counsel shall make a written recommendation to the Committee and staff to either (1) convert the temporary admission to regular admission or (2) allow the temporary admission to terminate at the end of temporary term. If the recommendation is for regular admission, the Committee shall so recommend to the Court and the license of the temporary admittee shall remain in full force and effect while the recommendation proceeds. If the recommendation is to allow termination of the temporary admission, bar counsel shall refer the matter to the presiding disciplinary judge for a hearing and the temporary license shall lapse at the end date of the temporary admission.
 - v. If an applicant's temporary admission is terminated, the applicant may not reapply for admission for a period of five years from the date of the termination, unless the Committee, the presiding disciplinary judge, or the Court orders otherwise.

(b) Determination of Character and Fitness; Burden of Proof; Relevant Factors and Evaluation. The applicant shall have the burden of proving good moral character by clear and convincing evidence. The Committee on Character and Fitness shall, in determining the character and fitness of an applicant to be admitted to the state bar, review, consider, and evaluate the traits, characteristics, criminal history, and conduct set forth below.

1. *Relevant Traits and Characteristics.* An applicant shall demonstrate current and past possession of the following traits and characteristics; a significant deficiency in one or more of these traits and characteristics in an applicant may constitute a basis for denial of admission:

- A. honesty;
- B. trustworthiness;
- C. diligence;
- D. reliability; and

E. respect for law and legal institutions, and ethical codes governing attorneys.

2. Conviction of a Crime.

A. There shall be a presumption, rebuttable by clear and convincing evidence presented at ~~an~~ informal or formal hearing proceeding, that an applicant who has been convicted of a misdemeanor involving a serious crime or of any felony shall be denied admission. “Serious crime” includes any crime, a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, theft, or moral turpitude, including a conspiracy, a solicitation of another, or any attempt to commit such a serious crime.

B. The Committee, acting through one of its panels, shall transmit any recommendation for admission of an applicant who has been convicted of a misdemeanor involving a serious crime or of any felony to the clerk of the Court prior to admission.

3. Other Relevant Conduct. The revelation or discovery of any of the following should be treated as cause for further detailed investigation by the Committee on Character and Fitness prior to its determination whether the applicant exhibits current and past possession of the traits and characteristics evidencing the requisite character and fitness to practice law:

A. unlawful conduct not resulting in conviction of a crime as set forth in paragraph (b)(2) of this rule;

B. academic misconduct;

C. making a false statement, including omissions;

D. misconduct in employment;

E. acts involving dishonesty, fraud, deceit or misrepresentation;

F. abuse of legal process;

G. neglect of financial responsibilities;

H. neglect or disregard of ethical or professional obligations;

I. violation of an order of court;

J. evidence of conduct indicating mental or emotional instability impairing the ability of an applicant to perform the functions of an attorney;

K. evidence of conduct indicating substance abuse impairing the ability of an applicant to perform the functions of an attorney;

L. denial of admission to the practice of law in another jurisdiction on character and fitness grounds; and/or

M. disciplinary complaints or disciplinary action by an attorney disciplinary agency or other professional disciplinary agency of any jurisdiction.

4. *Evaluation of Criminal History and Other Relevant Conduct.* The Committee on Character and Fitness shall determine whether the character and fitness of an applicant qualifies the applicant for admission. In making this determination, the following factors shall be considered in assigning weight and significance to an applicant's prior conduct:

A. the applicant's age, experience and general level of sophistication at the time of the conduct;

B. the recency of the conduct;

C. the reliability of the information concerning the conduct;

D. the seriousness of the conduct;

E. consideration given by the applicant to relevant laws, rules and responsibilities at the time of the conduct;

F. the factors underlying the conduct;

G. the cumulative effect of the conduct;

H. the evidence of rehabilitation;

I. the applicant's positive social contributions since the conduct;

J. the applicant's candor in the admissions process; and/or

K. the materiality of any omissions or misrepresentations by the applicant.

(c) Recommendation for Admission Based on Preliminary Review.

1. The Manager of Attorney Admissions or that person's designee ~~Committee and its staff~~ shall conduct a complete preliminary review of the applications based on the categories of criminal convictions and other relevant conduct listed in paragraphs (b)(2) and (3) of this rule.

2. Direct Recommend. The Manager of Attorney Admissions or that person's designee shall review all applications for information about the ethical or moral fitness of each applicant. The Manager or designee shall certify to the Committee the names of those applicants who, without further investigation, appear to be qualified for admission, and shall certify to the Supreme Court the names of all such qualified applicants. Those applicants not certified by the Manager shall be referred to the Committee for further review. If it is determined that there is no conduct that falls within one of these categories, the Committee shall recommend the applicant for admission,

~~or recommend the applicant for admission pending the receipt of a passing score on the bar examination(s).~~ At least semiannually, the Manager of Attorney Admissions or that person's designee shall brief the Chair of the Committee on the approximate number of applicants recommended for admission through the Direct Recommend process in the preceding six-month period, and any emergent issues with that process.

(d) Further Investigation.

1. Upon completion of the preliminary review, if it is determined that there is conduct that falls within one or more of the categories listed in paragraphs (b)(2) and (3) of this rule, a committee member (the "Investigating Member") shall be designated to investigate as appropriate and evaluate whether, and to what extent, the applicant's prior criminal conviction(s) or other conduct should prevent the applicant's admission.

2. In the event the ~~Investigating committee m~~Member requires additional information or documentation to facilitate making a determination of the applicant's character and fitness, the member may make an inquiry, either orally or in writing, to the applicant or any other person, for additional information or documentation, and may utilize the subpoena and deposition powers as set forth in paragraph (a)(3) of this rule.

3. After the necessary investigation, the ~~Investigating committee m~~Member shall either (i) ~~terminate the investigation dismiss the inquiry~~ and recommend the applicant for admission, ~~or~~ (ii) ~~recommend that call for~~ an informal inquiry ~~or formal hearing be held~~ pursuant to paragraphs (e) ~~or (f)~~ of this rule, or (iii) request that the Chair call for a hearing pursuant to paragraph (f) of this rule, which request the Chair may grant or deny. The Committee shall review the recommendation that a formal hearing be held.

4. Notwithstanding the above provisions, an applicant shall not be recommended for admission without at least an informal hearing inquiry pursuant to paragraph (e) of this rule in any cases in which the investigation reveals and the ~~Committee~~ Investigating Member determines that there are serious allegations of conduct by the applicant, whether or not such conduct resulted in a criminal conviction, that involve:

A. commission of a violent crime;

B. fraud, deceit or dishonesty on the part of the applicant that has resulted in damage to others;

C. neglect of financial responsibilities due to circumstances within the control of the applicant;
or

D. disregard of ethical or professional obligations.

(e) Informal ~~Hearings~~ Inquiries. Informal ~~hearings~~ inquiries shall be held in cases involving serious allegations of conduct specified in paragraph (d)(4) above ~~and -Informal hearings~~ may also be held in other cases as determined by the ~~Committee~~ Investigating Member.

1. *Notice.* Oral or written notice shall be provided to the applicant, which notice shall advise the applicant generally of the subject, or subjects, of the informal hearing inquiry and the time and place thereof.

~~2. *Informal Hearing Record.* All informal hearings shall be recorded.~~

~~32. *Permissible Evidence Consideration of Documents or Information.* Documents or other information provided to the Investigating Member Committee in confidence shall remain confidential and may be used referenced, shared or considered at the informal inquiry hearing only if the providing party agrees. Absent such agreement, confidential information shall not be presented referenced, shared or considered at the informal inquiry hearing or otherwise considered by the panel Committee in determining the applicant's character and fitness for admission to practice law. Because the objective of the informal inquiry is to informally resolve the Investigating Member's concerns efficiently, there is no formal introduction of exhibits or other evidence into a record at an informal inquiry. Neither the panel nor the applicant may subpoena the appearance of witnesses at an informal inquiry.~~

~~4. *Disclosure; Discovery.* Twelve (12) days before the hearing, or otherwise as agreed by the parties, the Committee and the applicant shall simultaneously disclose documents and other information to be used at the hearing. The Committee need not provide to the applicant copies of documents the applicant has submitted during the application process, and applicant need not provide to the Committee copies of documents submitted with the application. Confidential information shall be subject to disclosure or discovery only if the providing party has agreed to its use at the hearing as set forth in paragraph (e)(32) of this rule. The chair of the Committee, in the exercise of discretion, may permit untimely disclosed information to be admitted at hearing, for good cause shown.~~

~~53. *Informal Inquiry Hearing Panel.* An informal inquiry hearing panel shall consist of at least three members of the Committee, including at least one attorney member and one public member, assigned by Committee staff on a rotating basis. An informal hearing inquiry panel shall act for and on behalf of the Committee for all actions and decisions related to informal inquiries hearings. The Investigating Member shall participate in discussion with and questioning of the applicant during the informal inquiry but shall not be part of the three-person panel and shall not deliberate or vote at the conclusion.~~

~~64. *Attendance of Panel Members at Hearing- Informal Inquiry.* In the case of an informal hearing inquiry required by this rule, at least three members shall attend in person the hearing. Panel members who do not attend the hearing shall review the entire record of the informal hearing before participating in making a recommendation. Members are strongly encouraged to participate in person.~~

~~75. *Concurrence of Members.* A recommendation of admission shall require the concurrence of a majority of the panel members, but in no event less than three members. If this requirement is not met, a formal hearing shall be held pursuant to paragraph (f) of this rule.~~

~~86. *Decision.* The Committee Panel's decision shall be in writing.~~

A. *Recommendation to admit.* The ~~Panel's Committee's~~ recommendation to admit an applicant shall be deemed final action by the Committee and transmitted to the Court, subject to the issuance of the certification by the clerk of this Court.

B. *No ~~Re~~recommendation ~~not~~ to admit; ~~formal~~ hearing required.* If the ~~Panel's Committee's~~ decision is not to recommend admission, ~~a copy of the record of the informal hearing shall be made a part of the applicant's file, and~~ a formal hearing shall be held pursuant to paragraph (f) of this rule.

C. *Recommendation for temporary admission ~~with conditions~~; review by the Court.* If the ~~Panel Committee~~ recommends temporary admission ~~with conditions~~, ~~the Committee it~~ may consult with bar counsel to determine ~~conditions~~ terms of that temporary admission. The ~~Panel's Committee's~~ decision shall contain findings and a recommendation outlining the duration and terms ~~conditions~~ of the temporary admission. Such decision shall reflect that bar counsel shall monitor and supervise the ~~temporary conditional~~ admittee and submit quarterly reports of compliance or non-compliance, and that if the ~~conditional~~ admittee is found by the Committee or bar counsel to have materially violated ~~a term condition or terms conditions~~ of the admission, bar counsel shall commence a discipline violation proceeding pursuant to paragraph (a)(4)(D)(iii) above, which may result in the temporary admittee's admission being revoked, or the terms being amended or extended or both any sanction ranging from extension of the period of conditional admission to disbarment. The decision recommending temporary admission ~~with conditions~~ shall be transmitted to the Court for review in accordance with paragraph (g)(2) of this rule.

D. *Notice to applicant.* In all cases, the ~~Panel's Committee's~~ decision shall be mailed to the applicant at the applicant's last known address, and a copy shall be mailed to the applicant's attorney of record, if applicable.

(f) **Formal Hearings.** The Committee ~~shall~~ may hold a ~~formal~~ hearing, ~~or formal hearings~~, as may be reasonably required and as required pursuant to this rule, to enable the Committee to pass upon the applicant's qualifications.

1. *Notice.* Written notice of such ~~formal~~ hearing ~~or hearings~~ shall be given to bar counsel and the applicant, specifying:

A. the time, place and nature of the hearing;

B. the legal authority and jurisdiction under which the hearing is held;

C. a reference to the particular sections of the statutes and rules involved, if applicable;

D. a short plain statement as to the subject, or subjects, and purpose, of the hearing;

E. that the applicant may be represented by an attorney at the hearing, that the applicant shall be afforded an opportunity to respond and present evidence of all issues involved, and that the applicant shall have the right of cross-examination; and

F. that the applicant shall have the burden of proving, by clear and convincing evidence, the requisite character and fitness qualifying the applicant for admission to the practice of law in Arizona.

2. Conduct of ~~Formal~~ Hearings.

A. Hearing Panel. The hearing panel shall consist of five members, including two attorney members of the Committee and two public members of the Committee assigned by Committee staff on a rotating basis, none of whom shall have participated as members of the informal inquiry panel in the matter, if such informal inquiry was held; and the Presiding Disciplinary Judge, who shall preside over the hearing.

AB. The applicant or the applicant's attorney shall present evidence on behalf of the applicant at the hearing. ~~One or more members of the Committee~~ The Investigating Member, or an appointed special investigator, ~~may~~ shall present evidence on behalf of the Committee. ~~The chairperson shall designate any member of the Committee hearing panel as the presiding member and such member shall make all evidentiary and procedural rulings. The Investigating member shall not participate in the deliberations or vote with the hearing panel.~~

BC. The ~~formal~~ hearing shall be recorded and may be conducted without adherence to the Arizona Rules of Evidence. Neither the manner of conducting the hearing nor the failure to adhere to the Rules of Evidence shall be grounds for reversing any decision by the ~~Panel Committee~~ provided the evidence supporting such decision is substantial, reliable and probative. Irrelevant, immaterial or unduly repetitious evidence shall be excluded. The applicant shall have the right to be represented by counsel, to submit evidence, and to cross-examine witnesses.

CD. Copies of documentary evidence may be received at the discretion of the ~~P~~presiding Disciplinary Judge ~~panel member~~. Upon request, any ~~Committee panel~~ member, ~~the Investigating Member~~, an appointed special investigator, bar counsel in connection with duties set forth in Rule 36(a)(2)(C), the applicant, or applicant's counsel shall be given an opportunity to compare the copy with the original.

DE. Notice may be taken of judicially cognizable facts.

EF. The applicant shall have the burden of proving, by clear and convincing evidence, the requisite character and fitness qualifying the applicant for admission to the practice of law.

3. *Permissible Evidence.* Documents or other information provided to the Committee in confidence shall remain confidential and may be used at the hearing only if the providing party agrees. Absent such agreement, confidential information shall not be presented at the hearing or otherwise considered by the ~~Panel Committee~~ in determining the applicant's character and fitness for admission to practice law.

4. *Disclosure; Discovery.* Twelve (12) days before the hearing, or otherwise as agreed by the parties, the Committee and the applicant shall simultaneously disclose documents and other information to be used at the hearing. The Committee need not provide to the applicant copies of documents the applicant has submitted during the application process, and applicant need not

provide to the Committee copies of documents submitted with the application. Confidential information shall be subject to disclosure or discovery only if the providing party has agreed to its use at the hearing as set forth in paragraph (f)(3) of this rule. The Presiding Disciplinary Judge chair of the Committee, in the exercise of discretion, may permit untimely disclosed information to be admitted at hearing, for good cause shown.

~~5. *Formal Hearing Panel.* A formal hearing panel shall consist of at least a majority of the current members of the Committee. Panel members may attend hearings using electronic means but are strongly encouraged to participate in person. A decision shall be made by a majority of the panel, as defined above, as soon as practicable.~~

~~65. *Decision.* A recommendation of admission shall require the concurrence of a majority of the panel members. The Panel's Committee's final decision shall be in writing. If the Panel Committee recommends against admission, it shall make separate findings of fact. If the Panel Committee recommends temporary admission with conditions, the Panel Committee may consult with bar counsel to determine the terms conditions of the temporary admission. The Panel's Committee's decision shall contain findings and a recommendation outlining the terms conditions of the admission. Such decision shall reflect that bar counsel shall monitor and supervise the temporary conditional admittee, and submit quarterly reports of compliance or non-compliance, and that if the conditional admittee is found by the Committee or bar counsel to have materially violated a term condition or terms conditions of the admission, bar counsel shall commence a violation proceeding pursuant to paragraph (a)(4)(D)(iii) above discipline proceedings, which may result in the temporary admission being revoked, or the terms being revised or extended or both any sanction ranging from extension of the period of conditional admission to disbarment. The A decision recommending temporary admission with conditions shall be transmitted to the Court for review in accordance with paragraph (g)(2) of this rule. A decision recommending admission under any circumstances for an applicant whose conduct was considered under paragraph (d)(4) of this rule must be accompanied by written findings and recommendations to the Court. Any other decisions recommending regular admissions require no written findings to the Court.~~

~~76. *Notice to Applicant.* The Panel's Committee's final decision shall be mailed to the applicant at the applicant's last known address, and a copy shall be mailed to the applicant's attorney of record, if applicable.~~

~~87. *Denial of Admission as Final Decision.* The decision of the Committee to deny admission is final, absent the filing of a petition for review by the applicant pursuant to paragraph (g)(1) of this rule.~~

(g) Review by the Court.

1. Petition for Review.

A. An applicant aggrieved by any decision of the Committee on Examinations or the Committee on Character and Fitness may, within twenty (20) days after such occurrence, file a verified petition with this court for a review, except as provided in Rule 35(d)(7). The petition shall succinctly and briefly state the facts that form the basis for the complaint, and applicant's reasons

for believing this Court should review the decision of the Committee on Examinations or the Committee on Character and Fitness.

B. A copy of said petition shall be promptly served upon the Committee from which the complaint arose and that Committee shall, within thirty days of such service, transmit said applicant's file, including all findings and reports prepared by or for either Committee, and a response to the petition fully advising this Court as to that Committee's reason for its decision and admitting or contesting any assertions made by the applicant in said petition. Thereupon this Court shall consider the papers so filed, together with the petition and response, and make such order, hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and obligations of applicant judged in the light of that Committee's and this Court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law.

2. *Review on Court's Own Motion.* All recommendations for temporary admission ~~with conditions~~ are subject to *de novo* review by the Court. The Committee on Character and Fitness, through the assigned hearing panel, shall file its written decision recommending temporary admission with terms conditions, ~~along with the memorandum of understanding between the applicant and the Committee~~, with the clerk. The Court may decline review, or it may grant review on its own motion. If the Court declines review, the panel's Committee's recommendation for temporary admission with terms conditions shall be final. If the Court grants review, the Court may issue such orders as may be appropriate for its review, including remanding the matter to the Committee for further action, ordering transmittal of the applicant's file, ordering additional briefing and/or setting the matter for oral argument. After receiving all the appropriate pleadings and record, the matter shall be deemed submitted to the Court for its decision.

Appendix B

[DRAFT] MEMORANDUM [Version 3]

TO: The Supreme Court of Arizona

FROM: Attorney Regulation Advisory Committee

DATE: November 5, 2013

SUBJECT: Recommendations for Changes to Attorney Admissions Process

In early 2012, the admissions subcommittee of this Court's Attorney Regulation Advisory Committee (hereinafter "ARC") began designing a review of the entire attorney admissions process in Arizona. The purpose of ARC's review was to evaluate that process's actual fairness, its perceived fairness, and its effectiveness in meeting the goals of this Court—protecting the public, clients and the bar from persons who lack the character, fitness and or competence to practice law in this jurisdiction.

From January through November 2013, ARC convened monthly hearings, or "forums," to review the attorney admission process in Arizona, component by component, and to study discrete issues raised about each element. Issues ARC examined in depth during its hearings included:

- the requirements and attributes necessary for a determination of good character and fitness to practice law as set forth currently in the rules of this Court;
- the current methods of soliciting and gathering information on applicants to evaluate their character and fitness, including the Character Report and the questions thereon, reference and background checks, and staff file processing practices;
- the structure of the tribunals convened by this Court's Committee on Character and Fitness (hereinafter "C and F") to determine whether applicants meet the requirements for admission;
- the hearing procedures the C and F tribunals use to reach their decisions to recommend for or against admission; and
- the concept and effectiveness of conditional admission.

At each forum, ARC members received presentations and documentation from experts on given subject matter, describing the current state of the process or issue to be studied. ARC members had the opportunity to question the experts, and also to hear from interested members of the public, including most prominently counsel for applicants in the process, all of whose participation was encouraged. ARC also considered presentations from several other states' attorney admissions officials comparing their admissions processes with Arizona's current system to consider the advantages and disadvantages of possible change.

ARC originally had planned to present a comprehensive set of recommendations for revisions to the entire attorney admissions process in summer of 2014. After a thorough review of all information gathered during the 11 forums that took place throughout 2013, ARC intended to devote the first several months of 2014 to formulating and refining its comprehensive recommendations, with a goal of presenting them to this Court in final form by June 2014. However, ARC understands the sense of urgency for this Court to begin considering improvements to the attorney admissions process, and has accelerated its review and recommendation process for selected critical components of the attorney admission cycle for this Court's consideration during the pending rules cycle. Our recommendations concerning the structure of C and F tribunals, their general conduct of hearings, and the use of conditional admissions appear below. ARC will present its observations and recommendations on remaining attorney admissions issues in the following cycle.

I. RECOMMENDATIONS ON STRUCTURE OF THE C and F TRIBUNALS

From its earliest meetings and forums, ARC has been aware—through input from counsel, applicants, and current and past members of C and F—of shortcomings in the current tribunal structure that C and F employs at its hearings to determine whether an applicant possesses the requisite character and fitness to practice law. The input identified possible negative effects of the current tribunal structure on 3 areas: 1) the efficiency of the C and F function overall; 2) the actual fairness of the process; and 3) the perception of fairness in the process. To understand the nature of the criticism offered, a brief review of the current structure of C and F is useful.

The Current Structure of C and F Tribunals

Pursuant to Rule 36(b) of the Rules of the Supreme Court of Arizona, C and F must evaluate each applicant to determine whether he or she possesses the requisite character and fitness to be recommended for admission. Thus, the character reports of the roughly 900 applicants who are successful on the Arizona bar examination in a given year are assigned roughly equally to the 19 members of C and F for an initial review. The vast majority of applicants present character reports that contain no serious issues and that demonstrate the requisite character and fitness for admission without further inquiry. On these files the initially assigned C and F member is able to recommend

admission for the applicant unilaterally, and does so in approximately 92 percent of the matters per year.

The remaining 8 to 10 percent of the applications submitted in a given year present one or more issues that require closer scrutiny and evaluation by C and F. When the assigned member encounters such a file, Rule 36(d)(3)(ii) and or 36(d)(4) require that C and F constitute a panel of at least 3 members to hold an informal hearing and explore the outstanding character and fitness issues raised in the report and any subsequent investigation. It has been the practice of C and F that the committee member assigned to the file participates in the informal hearing panel, serving both as the principal questioner and presenter of issues on behalf of C and F, and as a member of the panel for purposes of deliberation and voting after the fact.

Historically, the practice of putting the assigned C and F member into this dual role developed out of a recognition that, after having spent so much time learning the file, the assigned C and F member was the most familiar with the facts of the case. Reliance on this familiarity was thought to best serve the purposes of efficiency on the all-volunteer C and F Committee. The Court should note that its current Rules do not require that the assigned member serve in both of these roles. In fact, the Rules do not require the originally assigned member to play any role at all in the informal hearing panel; the Rules merely require that at least three C and F members constitute a panel to hear and decide the matter.

If the informal hearing panel cannot by a majority vote recommend an applicant for admission, the matter proceeds to a formal hearing at which, by rule, a panel consisting of a majority of the members of C and F sits² as the tribunal. Here, too, it is the historical practice of C and F that the originally assigned member presents and serves as principal questioner for the committee, and also participates in deliberations and voting after the hearing. Additionally, those members who sat as panelists on the informal hearing also may currently participate in deliberation and voting after the formal hearing. Again, the Rules of this Court do not require the originally assigned member or the other informal hearing panelists to play any role in the formal hearing; nor do they preclude any specific role or multiple roles.

Observations about the current tribunal structure

Members of the public, in their written submissions and in their statements during the ARC public forums, made clear that they perceive the C and F member assigned an applicant file to play a role tantamount to “prosecutor” in the informal and formal hearing context. They observed that participation of the presenting member in deliberations and voting at both informal and formal hearings presents, if not a fundamental fairness issue,

² As applied to the current committee, which has 19 positions, a formal hearing requires at least 10 members.

then at least an appearance-of-fairness issue, for applicants. ARC acknowledges this point, and can see how, from the view of an applicant or the public, the practice appears to result in a C and F member acting as both advocate and judge in the same proceeding. Similarly, members of the public, past and present C and F members, and some ARC members noted their discomfort with panelists, who already had been called on to make up their minds about the ultimate issue at the informal hearing in a matter, subsequently participating in deliberations and voting on the same question at the formal hearing.

Whether the dual role currently played by C and F members as set forth above has an actual effect on fairness is subject to debate;³ however, in the opinion of the overwhelming majority of ARC, the *perception* of fairness to applicants, their counsel, and the public in general is negatively affected, and that appearance a significant enough factor on its own to merit revision to the structure and process of C and F.

Forum participants also observed that under the current hearing structure and process, when an applicant undergoes both an informal and a formal hearing, the witness questioning and fact-finding exercise is redundant across the two hearings. This is problematic, in that the duplication of effort wastes a huge amount of time and, more importantly, it lends itself to inconsistency in the record between two hearings, and possibly in a comparison of the findings. ARC members observe that the current C and F practice of engaging in evidentiary hearing and fact-finding at two separate levels of review is peculiar to Arizona; it is not followed in any of the other state jurisdictions we surveyed.

Participants also offered the related criticism that formal hearing panels under the current rule are potentially so large as to create significant inefficiencies in the process. At present, there are 19 members on C and F, and all are eligible to sit on any formal hearing panel. C and F members note from experience that formal hearing panels populated by so many members lend themselves at times to redundant questioning and unnecessarily long hearings, which create the risk of causing a formal hearing to run beyond one day. This is a particularly problematic event, because it is very difficult to reconvene the identical panel of volunteers at a time when everyone is available, and even more difficult to schedule a multi-day hearing at the outset with a volunteer committee. The larger the panel, the more likely it is that panel will reconvene

³ C and F and ARC members are split on this point. Those who do not believe the current structure leads to actual unfairness cite to empirical evidence that, on average, the informal hearing panels recommend for admission, with or without conditions, between 80 percent and 90 percent of applicants who come before them. Similarly, approximately 50 percent of those applicants who must go to a formal hearing ultimately are recommended for admission, with or without conditions. Those who believe that the current structure creates actual unfairness argue convincingly that the "prosecuting" member is placed in an inherent conflict when they are asked to perform dual roles, and the other members of the informal hearing panel similarly are conflicted when they are asked to deliberate anew on an issue they have already decided at a prior hearing.

for follow-on days with a different makeup than was present for the initial hearing day. That occurrence itself shakes the confidence of applicants and counsel in the fairness of the process, and creates at least the appearance of arbitrariness in both the process and the result. Finally, counsel observe that a panel of 19, or near 19, members at a formal hearing is unnecessarily intimidating to an applicant, without corresponding benefit.

Recommendations on Structure of the C and F Tribunal

In response to the above observations, ARC recommends the following changes to the C and F structure, which would both ensure fairness in the process and improve the perception of fairness.

As a preliminary matter, this Court should amend Rule 36 to empower the Manager of Attorney Admissions for this Court, or her designee, to recommend for admission, without further review by C and F members, applicants whose files are devoid of character or fitness issue indicators. The exercise of that authority be should subject to periodic reporting to the C and F Chair for review.

[To members of the ARC Committee of the Whole: After exploring and exhaustively evaluating many structures and processes to conduct the Character and Fitness evaluation function, your Admissions Subcommittee settled on recommending to the Court of a two-tier evaluation process. At each of those tiers, your Subcommittee has narrowed the structural options to two, for the consideration of the entire Committee. At our November 6 meeting, we will choose from that menu of options to constitute our final recommendation on C&F structure]

First-Level Review

Option One:

The first option would maintain the current practice of having an informal hearing manned by a tribunal of three C and F members, who would not include the C and F member assigned to the file. That member would present the matter and conduct principal questioning of the applicant and witnesses, under oath as is presently the practice, but would not participate in the tribunal's deliberations or decision. Upon conclusion of the proceedings, the tribunal would have the same options as it currently does, by majority vote: recommend admission of the applicant without conditions, recommend admission with conditions, or conclude that it cannot recommend applicant and refer the matter for second-tier review. If the matter was referred for second-tier review, under any of the options under consideration, the C and F members who participated in the tribunal at the informal would not participate as part of the second-tier review process. The member originally assigned to

the file would reprise her or his role in presenting the matter and leading the questioning at the higher review, however.

Option Two:

This option would convert the first level review from a “mini-formal hearing” with statements under oath and formalized evidence-gathering process to a meeting or interview with the applicant whose file was deemed not sufficiently clear to recommend without further review. The objective of this “informal inquiry” would be to allow committee members to evaluate the applicant face-to-face and discuss the issues that raised their apprehension in an informal, and hopefully more expedited, setting. The inquiry would be staffed by three C and F members, would not be recorded by a court reporter, would not place the applicant or any witnesses under oath, and would not include the formal gathering of evidence; rather it would be to allow C and F members to ask questions about matters that were not sufficiently clear in the application to give them comfort, to discuss problem issues that might not rise to the level of withholding an admission recommendation for an applicant but nonetheless trouble the panelists, and to satisfy themselves generally that an applicant does in fact possess the requisite character and fitness. After the inquiry, the panel would vote on whether they did or did not wish to oppose applicant’s admission. If opposed, the matter would be referred to the second-tier review process, whichever we select below. If not opposed, C and F will recommend the applicant for admission. Again, members of the inquiry panel will not participate in any second-tier review of the matter, but the member assigned the file will take on the role of presenter at the second, more formal, review stage.

Advantages of Options

The advantage to Option One over Option Two is its creation of an evidentiary record which a shifty applicant will have to live with. C and F members advise that in their experience, some percentage of applicants have attempted to drastically change their factual accounts and answers from the informal hearing to the formal hearing, and the existence of a written transcript of testimony under oath aids the committee in its focus on issues of truthfulness and integrity. Option One’s disadvantage is that such a record for comparison is not necessary in most cases, and reported testimony under oath consumes a substantial amount of time and money in those cases. Option two’s advantage is in allowing maximum flexibility and informality –and ultimately time savings, as C and F members advise that the large majority of current informal hearings result in a recommendation of admission, likely without conditions, after the panel has had the opportunity to drill down on issues for which it needed further information or explanation.

Second-Level Review

Option One:

The first option would maintain the current practice of having, for the higher review, a formal hearing manned solely by C and F members. Rather than the current practice of requiring a quorum of the 19-member panel, however, C and F would conduct formal hearings with a 5-member tribunal to include the C and F Chair or her designee, two attorney members and two public members, none of whom participated in the review below. The C and F member assigned the file would present the matter and question applicant and witnesses, as is current practice, but would not participate in deliberations or voting. This hearing would be reported, all witnesses would be under oath, and there would be a formal evidence gathering process. A majority vote of the 5-member panel would result in recommendation for admission without conditions, conditional admission, or no admission.

Option Two:

In this second option, the higher review would take the form of a hearing before a tribunal consisting of the Presiding Disciplinary Judge, one attorney member of C and F and one public member of C and F. All other features of the “formal hearing” would be the same as in Option One above.

Advantages of Options

At the second level of review, the advantage to Option One is that it keeps the evaluation process wholly within the C and F Committee rather than consuming PDJ time—for which there is a cost to the Court—yet still streamlines the formal hearing process. Proceeding with five C and F members instead of as many as 19 will reduce duplicative questioning of the applicant and witnesses, thus shortening the hearing, and will ease the scheduling of hearings and, if necessary, continuations of hearings, while still providing the advantage of having multiple minds participate in reaching a reasoned decision. The advantage to Option Two is in bringing consistency to decisions by having a common member—the PDJ—presiding over every formal hearing panel, possessing great experience in administrative proceedings. The three-person formal panel further streamlines the formal hearing process, with all the advantages that brings, even over the five-person tribunal of Option One, though fewer minds are involved in the decision.

II. RECOMMENDATIONS ON THE CONDITIONAL ADMISSION FEATURE

ARC undertook to evaluate the current conditional admissions option in response to concerns that it may not be working effectively. Under the current version of Rule 36(a)(4)(D), C and F has the authority to recommend “admission conditioned on compliance by the applicant with specified behavior for a specified period.” When this Court admits an applicant with conditions, under the current rule bar counsel is responsible for monitoring the applicant’s compliance with the conditions and retains authority to commence disciplinary proceedings for material violations of those conditions.

As a threshold matter, there is strong support among ARC membership to retain the option of conditional admission in some form. Additionally, current C and F membership unanimously regards conditional admission to be a valuable tool in meeting their responsibilities. Both ARC and C and F recognize that adjustments should be made to the provision to reduce problems and improve its functioning.

Supreme Court and State Bar staff provided to ARC during the review process data on the total number of conditional admittees since 2006, the number who were the subject of bar complaints, and the number who actually had been disciplined. During this seven year span—the only period during which reliable data exists—ARC was advised that approximately 14 percent of conditional admittees received some form of discipline. While that percentage is certainly higher than the percentage of admittees disciplined as a whole, it is the sense of ARC that the elevated percentage is reasonable in light of the challenges that this selected population faces. ARC also urges that the additional effort put into addressing the issues with some conditional admittees is an acceptable cost for providing an opportunity for admission to those select applicants who have overcome much adversity and demonstrated the requisite character. ARC recommends retaining conditional admission, with the following changes:

- Rule 36 would provide explicitly that what we now term “conditional admission” would be available only for classes of issues for which meeting the conditions imposed would be susceptible to objective measurement. These classes of issues would include alcohol and substance abuse, financial difficulties and mental health concerns that could be addressed by conditions such as the formulation of deliverable plans, attendance at counseling sessions, abstinence and testing, or establishment of consistent repayment track record, by way of example. Classes of issues not eligible for conditional admission would include, for example, dishonesty/integrity issues.

- Unlike the current scheme, admittees would be treated as truly conditional. Because of the confusion over the term “conditional admission,” we would cease to use that term. Applicants would enter the State Bar with “temporary admission,” the term of which would be the length of the conditions C and F would impose. The State Bar of Arizona would maintain responsibility for monitoring the temporary admittees’ compliance with the conditions of their admission, and upon violation would bring that matter before the Presiding disciplinary Judge, who would retain the sole authority over material violations of those conditions.
- Temporary admittees would no longer pass into the greater pool of admittees until successfully completing the terms of their conditional admission, and would not enjoy the same protections that regular admittees enjoy. This means that during temporary admission, they would not go to the attorney discipline process for violations of these conditions with its higher burden of proof. Bar counsel would retain the burden of proving violations of conditions to the PDJ, but only by a preponderance of the evidence.
- The PDJ would be tasked with determining 1) whether a violation of conditions occurred; and 2) if so, whether the violation warrants reinstatement with new, lengthened or modified conditions or revocation of the temporary admission altogether. The PDJ’s addition, lengthening or modification of conditions would be unreviewable. The PDJ’s decision to terminate admission for failure to satisfy conditions would be reviewable on appeal by this Court upon timely petition of applicant.
- Upon an applicant’s successful completion of the term of temporary admission, C and F would recommend that applicant to this Court for regular and unconditional admission.
- Rule 36 would require notification to all C and F members upon a finding that a conditional admittee had violated conditions, to create a feedback loop for evaluation of the conditional admission process as a whole **[we are still working on the language for this feedback provision]**